92-1193

NO.____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

GORDON L. WALGREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CATHERINE WRIGHT SMITH
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
(206) 624-0974
Counsel of Record

JAMES K. SELLS
510 Washington Ave.
Suite 300
Bremerton, WA 98310
(206) 479-4545
Counsel for Petitioner

HOWARD M. GOODFRIEND
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
(206) 624-0974
Counsel for Petitioner

aBCD Legal Printers, Seattle, Washington

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QUESTIONS PRESENTED FOR REVIEW

1. Is evidence that a prosecution is politically motivated relevant to the determination of the materiality of impeachment evidence that the Government failed to disclose in response to specific discovery requests?

2. Is a defendant entitled to a new trial where the Government failed to disclose FBI memoranda and reports that would have impeached the critical and uncorroborated testimony of FBI agents that the defendant agreed to exchange his legislative influence for gambling profits when the jury acquitted defendant of most of the charges relating to the illegal scheme alleged by the Government, including the crimes of extortion and conspiracy?

3. Is the denial of a defendant's motion for new trial based on Brady violations reviewed de novo?

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GORDON L. WALGREN,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gordon Walgren petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 18, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix at A-1 through A-12. The Order on

Reconsideration of Defendant's Motion for New Trial is reprinted in the Appendix at B-1 through B-75. Neither decision has been reported.

JURISDICTION

The District Court had subject matter jurisdiction under 18 U.S.C. § 3231. The trial court's Order Denying Defendant's Motion to Vacate Conviction and for New Trial, filed July 2, 1991, was appealable as a final judgment. Notice of Appeal was timely filed on July 8, 1991, under FRAP 4(b). The Ninth Circuit had subject matter jurisdiction under 28 U.S.C. § 1291.

On appeal, the Ninth Circuit affirmed by an opinion filed June 18, 1992. Appellant timely petitioned for rehearing on July 10, 1992, pursuant to the Ninth Circuit June 20, 1992, order extending the time for filing a petition for rehearing. Appellant's petition for rehearing and

suggestion for rehearing en banc were denied by order filed September 29, 1992.

This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Amendment V, U.S. Constitution Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Procedural History.

Appellant Gordon Walgren was convicted on October 3, 1980, of three counts of a 19-count indictment arising out of an FBI sting. (ER 157, 167, 197) The Ninth Circuit affirmed his conviction on direct appeal. United States v. Bagnariol, et. al, 665 F.2d 877 (9th Cir. 1981), cert. denied 456 U.S. 962, 102 S. Ct. 2040, 72 L. Ed. 2d 487 (1982).

Walgren timely moved for a new trial and sought a writ of coram nobis vacating his mail fraud and RICO convictions. The District Court denied the motion and the writ on September 6, 1988. United States v. Walgren, 695 F. Supp. 496 (W.D. Wash. 1988). The Ninth Circuit reversed the District Court and granted the writ, vacating Walgren's mail fraud and RICO convictions. The Ninth Circuit also remanded to the District Court with instructions to consider

on the merits Walgren's motion for a new trial on the sole remaining Travel Act count. United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989).

On remand, the District Court again denied Walgren's motion for a new trial by order dated July 2, 1991. (Appendix B-1 through B-75) The Ninth Circuit affirmed the District Court by memorandum decision. (Appendix A-1 through A-12)

B. Statement of Facts.

Gordon Walgren was indicted following a 20-month FBI sting operation known as "Gamscam." The Government claimed that Walgren, who was then Washington State Senate majority leader, Washington State House Speaker John Bagnariol, and lobbyist Patrick Gallagher, had agreed to use their legislative influence to pass legislation legalizing gambling in exchange for 18% of the profits in a corporation controlled by

the undercover FBI agents operating the sting. (Docket 15)

As most of the Government's case consisted of surreptitious tape recordings of the agents' conversations with defendants, in discovery requests Walgren asked for notes and reports made by FBI and state agents concerning those conversations, and for scientific reports and records concerning the devices used to record them. (Dockets 19, 63, 113; Tr 445, 786) The Government did not disclose telexes in the FBI files summarizing the statements of Walgren and his co-defendants. The Government represented that no scientific reports existed. (Docket 81) The Government failed to disclose all repair records for the recorders used to secretly record the defendants' conversations.

Walgren was charged with 19 counts, including extortion, conspiracy, mail fraud, violation of the Travel Act, and RICO.

(Docket 15) District Court Judge Walter McGovern dismissed six counts at the close of the Government's case. (8/26/80 Minute Entry) The jury acquitted Walgren of five counts, including conspiracy and extortion, and was unable to reach a verdict on five others. (ER 167) Walgren was convicted of a single Travel Act violation (Count XVII)[1].

The Travel Act count alleged that on January 30, 1980, Walgren used the telephone with the intent to promote and carry on bribery in violation of state law and to promote and carry on extortion in violation of federal law. Walgren received a phone call on January 30, 1980, from "Hal Reed," the undercover name of FBI agent Harold

---

[1] Walgren was also convicted on a single count of mail fraud (Count XXIV), and, based on these two predicate offenses, a single count of RICO (Count II). (ER 167, 197) These two convictions were vacated by the Ninth Circuit on a writ of coram nobis based on this Court's opinion in McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), in United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989).

Heald. The two discussed a gambling bill and the potential sale of a trucking business in which Walgren held an interest. The transcript of the telephone call was Trial Exhibit 98. It is reproduced in the Appendix at D-1 through D-10. The jury acquitted Walgren of charges of extortion, conspiracy, and a Travel Act violation based on a meeting in Portland on January 26, 1980, which was directly related to this January 30 phone call. (ER 157, 167)

The Government had alleged that Walgren joined in the alleged illegal scheme that provided the basis for the Government's charges by agreeing to exchange legislative favors for gambling profits in meetings on November 8, 1978, February 13, 1979, and July 27, 1979. (ER 157, Indictment at 7-8, 10, 20-21) These charges were uncorroborated in the hundreds of hours of tape recordings which the Government agents had made. Agent "Hal Reed" claimed at trial

that at each of these three meetings the conversations were not recorded, either by design or because the recorder malfunctioned at the precise time when Walgren allegedly agreed to receive illicit funds. (Tr 139, 214, 489) Walgren in fact never accepted any funds from the agents, and expressly rebuffed the agent's attempts on one occasion to give him a cash contribution. (Trial Ex. 87; Tr 797, 3155)

Following his conviction, Walgren obtained Government documents regarding the undercover investigation under the Freedom Of Information Act. In response to his FOIA request, Walgren obtained an FBI memo suggesting that there had been no difficulty with the tape recorder until its last utilization in October 1979, eight months after Reed claimed it had first malfunctioned. (ER 354, Ex. O to Walgren Aff.) Walgren also obtained for the first time FBI memos and reports summarizing each

of the three critical unrecorded meetings at which Government agents testified that Walgren agreed to the gambling profits for legislative influence scheme.

The evidence which the Government refused to provide to Walgren before trial would have raised sufficient doubts of Walgren's agreement to exchange influence for a share of gambling profits to result in his acquittal on Count XVII. The case against Walgren on Count XVII was based on the testimony of the Government agents that Walgren had agreed to exchange 6% of So-Cal's gambling profits for his legislative influence in support of gambling legislation. (Tr 143, 223-24, 498, 523) The telexes and reports showed that at the precise time that the agents testified that Walgren was "committed" to the scheme, they were reporting to their superiors that Walgren was not in fact committed, that more time was needed to obtain his agreement, and

that, at best, he had shown only "apparent interest" in the agents' proposals to buy Walgren's influence, and that the investigation was continued for many months after the Government had taped evidence of the other defendants accepting funds from the Government agent solely to implicate Walgren in the alleged scheme.[2]

---

[2] Included in those documents was a December 1978 report in which the Seattle FBI office informed the National Director that "no funds are being requested by the Seattle Division to pay Bagnariol or Walgren, inasmuch as it is not known what the individuals will ask for in return for their influencing legislation." (Er 354, Ex. E to Walgren's Aff.) At trial, agent Reed had testified that Walgren first agreed that he would exchange money for legislation in a meeting on November 8, 1978, some six weeks before the FBI reported that it did not know "what the individuals will ask for." (Tr 138, 147, 148)

Reed also testified that Walgren confirmed his agreement to exchange 18% of So-Cal's profits for gambling legislation in a February 13, 1979, meeting in Olympia, Washington, at which Walgren allegedly told Reed that "he was satisfied with the 18 percent." (Tr 223-24) Although Reed's meetings with the defendants on February 13 were all tape recorded, Reed claimed that when he was discussing the agreement with

The agents' testimony was the only evidence from which the jury could have found that Walgren had agreed to the

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Walgren the switch controlling his Nagra body recorder went off by itself. (Tr 227) In an undisclosed FBI report regarding that meeting there is no mention of any taped conversations with Walgren and no indication that the recorder was malfunctioning. (ER 354, Ex. Z to Walgren Aff.)

In another undisclosed memo written the week after the crucial February 13, 1979, meeting, the Seattle Division still thought it necessary to lure Walgren to San Francisco in order to get Walgren to commit himself to the scheme. (ER 354, Ex. R. to Walgren Aff.) Other reports following this February meeting would have allowed Walgren to impeach the agents' testimony by showing that at the time the FBI agents still believed that Walgren had not yet committed himself to the scheme that Reed testified to at trial. (See, e.g., ER 354, Ex. V, W and Y to Walgren Aff.)

At the July 27, 1979, San Francisco meeting with the agents, Walgren allegedly agreed for a third time to exchange his influence in return for a percentage of the gambling profits. (Tr 498, 523) But in an undisclosed report to the FBI National Director following this meeting, the Seattle FBI office reported that "Walgren is apparently interested in the undercover agent's plans although he has not yet committed himself entirely to it." (ER 354, Ex. AA to Walgren Aff., see also Ex. F to Walgren Aff.)

Government's scheme. The only corroboration cited by the Government and relied upon by the Ninth Circuit was the testimony of a newspaper reporter who was called as a rebuttal witness. The reporter testified that Walgren, in an interview before his trial, stated as follows:

> Q. What did Mr. Walgren say regarding his reaction to the discussion that he was having with the FBI concerning 18 percent?
>
> . . .
>
> A. Well, he said, and I quoted him, "But the suggestion was made by them and not us. I could very well have said I was interested in taking it. I might have thought it was a good idea, but I don't believe I said it."

(Tr 3759-60) Walgren's equivocal statement, presented not in the Government's case in chief but on rebuttal, was the only "corroboration" of the agents' testimony in a trial lasting over a month. It demonstrates the critical nature of the

agents' testimony and the devastating effect the withheld evidence had on the Government's case against Walgren.

REASONS FOR GRANTING THE WRIT

The Government's Refusal To Provide Exculpatory Evidence In A High Profile Case Motivated By Political Concerns Is An Issue Of Exceptional Importance That This Court Should Consider.

This case epitomizes the importance of effective and thorough judicial review of claims of prosecutorial misconduct. This Court should grant the writ because the Government's reliance on the finality of a criminal conviction that has been undermined by its own refusal to provide the defense with evidence that could be used to impeach its key witnesses presents a question of exceptional importance that this Court should resolve. This Court should issue a writ of certiorari because the Ninth Circuit's decision unconstitutionally rewards the Government for refusing to disclose evidence favorable to the defense

before trial and raises an issue this court should decide concerning the standards of materiality established by United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), when there is evidence that the prosecution was politically motivated.

Evidence of improper prosecutorial motives should be relevant to determining the materiality of undisclosed evidence because the prosecutor's obligation to reveal exculpatory materials implicates the Government's responsibility to insure that justice is done. See, United States v. Agurs, 427 U.S. 97, 114, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976), quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 639, 79 L. Ed. 1314 (1935). Undisclosed evidence in this case that the Gamscam sting continued solely in order to implicate Walgren supported a finding of materiality:

> "[W]hen the suppressed evidence is of less obvious materiality, improper prosecutorial motives may be relevant," either as an admission of materiality, or because we might choose to reverse "as a prophylactic against willful misconduct."

United States v. Butler, 567 F.2d 885, 889 (9th Cir. 1978), quoting United States v. Gerard, 491 F.2d 1300, 1302-03 (9th Cir. 1974). The Ninth Circuit improperly ignored the prosecutor's improper motives in this case.

The federal sting operation that led to Walgren's indictment was one of a number of apparently politically motivated FBI "stings" directed at public officials. At the time of the Gamscam "sting," Walgren was majority leader of the Washington State Senate and was contemplating running for the office of State Attorney General in 1980. The Gamscam operation was orchestrated by the Seattle U.S. Attorney's office and the FBI, with help from the Washington State

Patrol and encouragement from then-governor, Dixie Lee Ray. (See ER 354, Ex. A to Walgren Aff.) The very first memorandum from the Seattle Division of the FBI to the National Director that mentions Walgren, prepared in September 1978, explains then U.S. Attorney John Merkel's "personal interest" in this case and predicts that Walgren's services could be "bought" in the next three months.

One defendant began accepting payments from the undercover agents as a "political consultant" almost immediately. At the beginning of the "sting," the FBI thought an investigation extending over many months would be inappropriate. (ER 354, Ex. D to Walgren Aff.) Nevertheless, the investigation dragged on for almost two years because the local FBI and U.S. Attorney Merkel became so enamored of trying to make Walgren break the law that they did not want to stop the "sting." (See ER 354,

Ex. E, F and G to Walgren Aff.) Over a year after the FBI's own legal counsel recommended that the investigation be short-lived, the FBI National Director sent a telex to the Seattle FBI office noting that Mr. Merkel had "protested the prohibition of further payments to Bagnariol because Walgren was still being investigated." (ER 354, Ex. H to Walgren Aff.)

The Government continued this investigation for many months, after it had taped evidence of the other defendants accepting money, solely to frame Walgren. This Court should consider the effect of evidence of the prosecutor's motivation on the failure to disclose exculpatory evidence because this Court has recently concluded that the prosecutor would have no obligation to disclose such information to the Grand Jury in seeking an indictment based on a politically motivated investigation. United

States v. Williams, ___ U.S. ___, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992).

The 5-member majority in Williams concluded that the courts' limited control over the Grand Jury proceedings does not authorize use of the judiciary's power to dismiss an indictment because the prosecutor failed to disclose to the Grand Jury "substantial exculpatory evidence." This makes even more important the enforcement of the Government's clear obligation to reveal such information to a requesting defendant once the indictment has been returned. See discussion of improper prosecutorial tactics in United States v. Williams, supra, 112 S.Ct at 1749-54 (Stevens, J., dissenting).[3]

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[3] In a new trial, Walgren could use the undisclosed evidence to assert an entrapment defense based upon this court's holding in Jacobson v. United States, ___ U.S. ___, 112 S.Ct. 1535, 118 L. Ed. 2d 174 (1992), that the Government must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

The Ninth Circuit apparently agreed with appellant that the Government's failure to produce the telexes undermining its agents' claim that Walgren had agreed to trade his legislative influence for a specific share of So-Cal's gambling profits deprived Walgren of exculpatory evidence, that is, "information that might have been helpful in conducting the cross-examination." United States v. Bagley, supra, 473 U.S. at 678. The Ninth Circuit's subsequent holding that reversal of Walgren's remaining conviction was not required improperly rewards the Government's misconduct by ignoring the critical importance of the agent's testimony in the Government's case against Walgren and the evidence that this prosecution was politically motivated. Although the opinion recites the Court's "reasonable probability" test, the Ninth Circuit's holding does not properly apply this standard of materiality

under Bagley in light of evidence of Government misconduct.

Even if the evidence concealed by the Government was not of critical value in undermining the Government's case against Walgren, it was nonetheless material because the other evidence against Walgren was far from overwhelming. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, supra, 427 U.S. at 113. The evidence against Walgren on Count XVII consisted of a transcript of a phone conversation in which Walgren and Hal Reed discussed a gambling bill and the potential sale of Walgren's interest in a trucking business. (Trial Ex. 98, Appendix D) The Government had to convince the jury that this discussion was in furtherance of Walgren's participation in a scheme to exchange his vote for gambling profits. But

the jury acquitted Walgren of extortion and conspiracy and of two other Travel Act counts, including a charge that Walgren traveled to Portland only five days before the phone call was the subject of Count XVII with the intent to facilitate or engage in bribery and extortion. (ER 157, 167; Docket 170) Further, the documentary evidence withheld from Walgren corroborated his defense that, unlike his co-defendants, he never agreed to receive anything in exchange for his vote, but instead discussed legalized gambling in an open and honest manner with a potential constituent.[4]

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[4] The Government's case against Walgren was considerably weaker than that against Bagnariol and Gallagher, both of whom were recorded taking money from agents. Much of the withheld evidence would have allowed Walgren to further distance himself from their misdeeds. For instance, at a time when Bagnariol and Gallagher had already committed "indictable offenses," the Government believed that it needed more time and opportunities to snare Walgren. (ER 354, Exhibits F, V, X, W, Y, AA, BB to Walgren Aff.)

Walgren has maintained since his indictment that this prosecution was politically motivated and improperly conducted. Much of the withheld evidence confirmed the political interest of those supervising the sting operation. (See, e.g., ER 354, Ex. A (U.S. Attorney "personally played a major role"); Ex. B ("personal interest" of U.S. Attorney); Ex. D (FBI Legal Counsel warned at beginning of sting that investigation should be terminated if not immediately productive because of political implications)). This Court should give particular scrutiny to the enormous power of the executive branch to target and prosecute prominent political figures, while depriving them of the very evidence needed to effectively defend the charges at trial. This Court thus should accept review and consider whether the Ninth Circuit erred in ignoring the Government's political motivation in extending its

investigation until it could obtain evidence against Walgren in determining the materiality of the withheld evidence.

CONCLUSION

Where the Government withholds material evidence with which the defense would have effectively impeached the Government's key witnesses in a politically motivated prosecution, the defendant is entitled to a new trial. This Court should grant the writ.

Respectfully submitted,

CATHERINE WRIGHT SMITH
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
Counsel of Record

JAMES K. SELLS
510 Washington Ave, Suite 300
Bremerton, WA 98310
Counsel for Petitioner

HOWARD M. GOODFRIEND
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
Counsel for Petitioner

December 28, 1992

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CATHERINE WRIGHT SMITH
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
(206) 624-0974
Counsel of Record

JAMES K. SELLS
510 Washington Ave.
Suite 300
Bremerton, WA 98310
(206) 479-4545
Counsel for Petitioner

HOWARD M. GOODFRIEND
6501 Columbia Center
701 Fifth Avenue
Seattle, WA 98164
(206) 624-0974
Counsel for Petitioner

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	NO. 91-30249
v.	)	D.C. No. CR-80-126-M
GORDON L. WALGREN, Defendant-Appellant.	)	MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Walter J. McGovern,
Senior District Judge, Presiding

Argued and Submitted June 1, 1992
Seattle, Washington

Before: WRIGHT, CANBY and WIGGINS, Circuit Judges

Gordon Walgren was convicted, as a result of an FBI sting operation, of accepting bribes in exchange for legislative influence. This is his latest in a string

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

of appeals of the conviction. This court has jurisdiction pursuant to 28 U.S.C. section 1291, and we affirm.

FACTS

Gordon Walgren, a former Washington State Senate Majority Leader, was arrested, as part of a 20-month FBI sting operation called "Gamscam." Walgren was charged with 19 separate counts, including extortion, conspiracy, mail fraud, RICO violations and Federal Travel Act violations. The indictment was based on an agreement whereby Walgren, State Speaker of the House John Bagnariol, and lobbyist patrick Gallagher promised to use legislative influence to legalize gambling in exchange for eighteen percent of a fictitious corporation, So-Cal, controlled by FBI agents.

Walgren was convicted on three counts: mail fraud, a RICO violation, and a Travel Act violation. He was sentenced to five years. This court affirmed his conviction.

United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). Walgren moved for a new trial and a writ of coram nobis vacating his mail fraud and RICO convictions The district court denied both, and this court reversed. United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989). This court vacated the two convictions and remanded for consideration of his motion for a new trial on the remaining Travel Act conviction. This case is an appeal from the district court's denial of a new trial.

The Travel Act conviction is based on a conversation Walgren had with undercover FBI agent Harold Heald (known as "Hal Reed" to Walgren). The jury implicitly found that Walgren used the telephone with the intent to promote and carry on bribery in violation of state law and to promote and carry on extortion in violation of federal law. In the phone conversation, Walgren and Heald

discussed a gambling bill and the possible sale of Walgren's trucking business.

After he was convicted, Walgren made Freedom of Information Act (FOIA) requests of the FBI, Department of Justice and the U.S. Attorney's Office for information relating to his case. The information he recovered is the basis of his request for a new trial.

DISCUSSION

A. Denial of Walgren's Motion for a New Trial.

Walgren first claims that he is entitled to a new trial or a dismissal because the government failed to disclose evidence favorable to the defense for impeachment purposes, pursuant to Brady v. Maryland, 373 U.S. 83 (1963). As the defendant notes in his brief, this court has said that the denial of a defendant's motion for a new trial based on newly discovered evidence should be reviewed for an abuse of

discretion. Walgren, 885 F.2d at 1426.[1] However, this court reviews alleged Brady violations de novo. We find no error in the district court's denial of Walgren's motion for a new trial.

This court said that Walgren's first claim should be decided by the district court under the following standard:

> When the prosecutor fails to disclose evidence favorable to the accused, 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

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[1] The defendant asserts that the proper standard is de novo review. For this proposition, he improperly cites Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986). Bagley, however, was a habeas corpus denial appeal, and such cases are always reviewed de novo. His cite to this case is somewhat misleading. Nothing in that case states that the standard of review of the denial of a new trial changes when the charge is governmental misconduct.

Walgren, 885 F.2d at 1427-28. The court said also that if Walgren could not show government misconduct using the above standard, then he must meet the standard the district court had used, that the evidence was newly discovered, material and likely to produce an acquittal, and that his failure to discover it sooner was not due to lack of diligence. Walgren, 885 F.2d at 1428 (citing United States v. Kenny, 645 F.2d 1323, 1343 (9th Cir.), cert. denied, 452 U.S. 920 (1981)).

The district court's order denying the motion correctly applied this standard. In fact, the order is very persuasive; it goes through, in great detail, each bit of evidence Walgren now offers and explains how it is not material and how, if all of the disputed evidence had been disclosed to the defense, there was no reasonable probability that it would have changed the result. After reviewing the record carefully, we

conclude that the district judge's findings are correct.

Among other claims, Walgren asserts that he was harmed by the destruction of some of Agent Heald's rough notes.[2] But, what were in fact destroyed were rough drafts of Form 302s, not rough notes. As the district court noted, this issue was fully litigated at trial. The district court denied Walgren's motion (several proceedings ago) to suppress Heald's testimony and the decision was affirmed on appeal. Walgren, 665 F.2d at 889-90.

Walgren wants discovery regarding the handwritten notes, which the government maintains are not Agent Heald's. Walgren is not convinced that they are not Heald's notes, and wants discovery because most, but not all, have been identified as Agent

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[2] We feel no need to address each of Walgren's allegations individually because the district court did a thorough job in its analysis.

Gordon's notes. He also wants discovery because some of the notes are illegible. But discovery would not prove helpful for two reasons. First, Heald testified at trial that he took no notes at crucial meetings for obvious reasons. Second, Walgren has shown no issue which would make Gordon's notes relevant.

Walgren claims that he needed the "newly discovered" evidence to impeach the government agents. This was critical, he claims, because the agents' testimony was uncorroborated. Contrary to Walgren's assertion, however, the agents' testimony was corroborated in large part by a government witness, a reporter.

None of the "newly discovered" evidence is material. There does not seem to be a "reasonable probability that, had the evidence been disclosed" to Walgren, "the result of the proceeding would have been different." In fact, the evidence largely

corroborates the agents' testimony. The judge did not err in so finding. Nor, as we stated in our earlier opinion, does the material offered by Walgren meet the regular requirements for a new trial on the ground of newly discovered evidence. See Walgren, 885 F.2d at 1428. As the district court again made clear on remand, the proffered evidence would not probably produce an acquittal.

B. Alleged Use of Perjured Testimony at Trial by Government.

Walgren also claims that his conviction should be reversed or he should be granted a new trial because the government made knowing use of perjured testimony. Denial of a motion for a new trial is reviewed for an abuse of discretion. Hard v. Burlington N.R.R., 812 F.2d 482, 283 (9th Cir. 1987).

Walgren claims that "knowing use" may be inferred from the undisclosed evidence before the court. This court has said that

the conviction should be set aside on this basis if "there is any reasonable likelihood that this evidence could have affected the judgment of the jury." Walgren, 885 F.2d at 1427 (citation omitted) (emphasis in original). Perjured testimony is material "'unless failure to disclose it would be harmless beyond a reasonable doubt.'" Id. (citation omitted). But first the court must be "reasonably well satisfied that the testimony given by a material witness is false." United States v. Macklin, 561 F.2d 958, 961 (D.C. Cir.), (quoting Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928)), cert. denied, 434 U.S. 959 (1977). Walgren bears the burden of establishing the grounds for his motion for a new trial. Walgren, 885 F.2d 1417, 1427-28.

The district court properly denied the motion because it was not reasonable well satisfied that the testimony of the agents was false, and its findings that there had

been no perjury were not clearly erroneous. In addition, there was no reasonable likelihood that the evidence in question could have affected the judgment of the jury. We conclude that the district court did not err.

C. Denial of Walgren's Request for an Evidentiary Hearing.

Walgren claims that "[a]lthough much of the information which the Government produced to Walgren was exculpatory on its face, some of the information was ambiguous and further discovery could have settled the District Court's doubts concerning its exculpatory nature and its effect at trial." It is clear from the record that the district court had no such doubts. If anything, the "undisclosed evidence" was consistent with the government's case as presented at trial and thus corroborated the government agents' testimony. The district court concluded that the material was

exculpatory only if portions of it were considered out of context. After reviewing the record, we agree with this assessment. The district court determined that further discovery and hearing would just prolong the inevitable and proper result, wasting money and resources in the meantime. We find that the district court acted properly in refusing further discovery or hearings. The judgment of the district court is AFFIRMED.

APPENDIX B

FILED
JULY 2, 1991
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO. CR80-126M
	)	
v.	)	ORDER ON
	)	RECONSIDERATION
GORDON L. WALGREN,	)	OF DEFENDANT'S
	)	MOTION FOR NEW
Defendant.	)	TRIAL
	)	

INTRODUCTION

Defendant Walgren was convicted by a jury in late 1980, his conviction was affirmed in 1982. he brought a motion for a new trial in May 1984, which was denied in September 1988 after a long, open-ended discovery period utilizing the Freedom of Information Act.

This Court denied Walgren's motion for a new trial concluding that its jurisdiction had lapsed, and that even in view of the open-ended extension to pursue his Freedom

of Information Act Requests, the delay of several years was unreasonable. The Ninth Circuit disagreed stating that given the open-ended continuance, the District Court's jurisdiction was not undermined.

In addition to the question of jurisdiction, this Court addressed the merits of the motion for a new trial and concluded that Walgren had shown:

> neither that the "evidence" was newly discovered, material, would likely produce an acquittal, nor that his failure to learn of it earlier was due to no lack of diligence on his part.

The Ninth Circuit concluded that this Court applied the wrong standard in assessing two of the three bases for Walgren's motion, and remanded the matter for this Court's reconsideration under the correct standards.

The sole remaining count on which Defendant Walgren stands convicted is the Travel Act count. Walgren summarizes his conviction on that count as follows:

> The Travel Act count on which Mr. Walgren was convicted alleged that on January 30, 1980, Mr. Walgren had used the telephone with the intent to promote and carry on bribery in violation of state law and to promote and carry on extortion in violation of federal law. (Docket 157, Count XVII) In this January 30, 1980 telephone conversation, Walgren took a phone call from FBI undercover agent Hal Reed. They briefly discussed a gambling bill and the potential sale of a trucking business in which Walgren had an interest. (Trial Ex. 98) As characterized by the Ninth Circuit in its decision on appeal of the conviction based on this conversation, "Walgren was convicted of violating the Travel Act . . . by causing the use of an interstate facility, the telephone, with the intent to further the unlawful gambling legislation scheme" alleged by the Government. United States v. Bagnariol, 655 F.2d 877, 877 (9th Cir. 1981).

(Defendant's Brief at 2.)

The two grounds for new trial that this Court must reassess are the claims (1) that the Government made knowing use of perjured testimony and (2) that the Government failed to disclose evidence favorable to Walgren in

response to his discovery requests. United States v. Walgren, 885 F.2d 1417, 1427 (9th Cir. 1989).

The Ninth Circuit stated that the first ground should be decided under the following standard:

> If the prosecutor knew or should have known that his case contained perjured testimony, then the conviction "must be set aside if there is any reasonable likelihood that this evidence could have affected the judgment of the jury." United States v. Agurs, 727 U.S. 97, 103 (1976) (emphasis added). the Ninth Circuit pointed out that in the United States v. Bagley, 473 U.S. 667 (1984), the court restated this test as "a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id. at 680.

The second ground for new trial should be assessed under the following standard:

> When the prosecutor fails to disclose evidence favorable to the accused, "the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

> have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." Id. at 682. The trial court should assess the possibility of an adverse effect that the prosecutor's failure to respond may have on the defendant's case 'in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response. Id. at 683.

Id. at 1427-28.

The Ninth Circuit then instructed that if Walgren fails to demonstrate governmental misconduct under the standards described above, his showing must then satisfy the four-part test on which this court relied: 1) the evidence is newly discovered and was unknown to the defendant at the time of trial, 2) the evidence is material, not merely cumulative or impeaching, 3) the evidence will probably produce an acquittal, and 4) failure to learn of the evidence

sooner was not due to lack of diligence. United States v. Kenny, 645 F.2d 1323, 1343 (9th Cir.), cert denied, 452 U.S. 920 (1981).

Thus, it appears that this Court must review the materiality issue in light of the "reasonable likelihood" or "reasonable probability" that the evidence in question would have affected the judgment of the jury or the result of the proceeding. If the Court finds no materiality under the Agurs and Bagley standards, the Court must review the materiality and effect of the evidence in considering the four-part test.

The Court, having received and considered the parties' memoranda and attachments, including the affidavits of Gordon Walgren, Peter Mair, and Murray Guterson, submitted in conjunction with the Government's Motion for Summary Affirmance and in conjunction with the May 20, 1991 hearing relative to the reassessment of

Defendant Walgren's grounds for a new trial, now decides as follows.

Defendant Walgren bears the burden of establishing the grounds for his motion for a new trial United States v. Walgren, 885 F.2d 1417, 1427-28 (9th Cir. 1989) (the defendant carries a different burden in order to establish each of his basis for a new trial). The burden of persuasion is on the defendant movant as he is the party attacking a presumptively valid jury verdict. United States v. Turner, 490 F. Supp. 583, 599 (E.D. Mich. 1979). The extent of the burden may vary given the nature of the grounds alleged for new trial. Id. For example, a new trial will not be granted unless the court is reasonably well satisfied that the testimony given by a material witness is false. See United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir.1977). In a footnote in a case cited by the defendant, the Tenth Circuity notes that

"normally, the government bears the burden of providing that a nonconstitutional error was harmless." United States v. Jefferson, 925 F.2d 1242, 1255 n.15 (10th Cir.). Regardless of who bears the burden of proof on the issues before the court, the result hereafter determined in the same.

ARGUMENT AND ANALYSIS

Defendant contends that "the Government's knowing use of false testimony can be inferred from the undisclosed evidence before the Court." (Defendant's brief at 6.) Defendant Walgren also contends that the Government failed to disclose, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), certain evidence favorable to the Defendant as impeachment material. The items of evidence will be addressed both as to whether the particular item gives rise to an inference of knowing use of false

testimony and whether it is exculpatory. (Exhibit references are to Defendant Walgren's exhibits submitted for reconsideration of his Motion for a New Trial.)

Telexes/Memos

The telexes and memoranda discussed in this section related to the testimony about three meetings: November 8, 1978, February 13, 1979, and July 27, 1979.

The November meeting established the basic agreement to influence legislation for money. The telexes reflect this general proposition without specifics of how the Defendants would perform their part of the bargain or what precisely they would receive in return.

The February meeting resulted in the percentage concept for Defendants'

performance. The telexes reflect the 18% figure for the three defendants.

The July meeting, where the Defendants met Vic Spann, solidified the general scheme, and reaffirmed the Defendants satisfaction with their benefits and obligations under this agreement. Walgren still had concerns about his part of the bargain, "how and when" to obtain the desired legislation, and was likewise concerned about his being associated with any payments from SoCal. The telexes generally reflect these circumstances.

a. **12/22/78 FBI Telex (Exhibit E)**.

Walgren makes arguments concerning testimony about certain meetings. Walgren states that Reed testified that Walgren first agreed on November 8, 1978 that he (Walgren) would exchange money for legislation. (TR 147.) (The transcript page cited by Walgren refers to direct testimony

of Harold Heald, who posed as Hal Reed.) That testimony, concerning a November 8 meeting (TR 138), is as follows:

Q During this meeting, was there any discussion about elections?

A Yes.

Q Tell us when those discussions occurred?

A They occurred throughout the conversation, primarily between Bagnariol and Walgren. They were concerned about the -- whether or not Bagnariol would retain a majority of seats in the House, and therefore, whether or not he would be the Speaker or remain as Speaker.

Q Did you have any questions about his effectiveness?

A I asked him if he lost that majority whether or not he could still handle the legislation for us and get it through, and he and Mr. Walgren said that they could.

Q Was there any discussion during the course of this meeting about money?

A I brought that up a number times.

Q In what context?

A That there was a lot of money to be made, profit to be made off the slot machines.

Q Did Mr. Gallagher have anything to say about that subject?

A The last time I brought it up John Bagnariol looked at me and looked at Gallagher and said, "As long as everyone makes money." With that he smiled and raised his eyebrows up and down several times. Gallagher immediately said, "We've discussed that and everyone's going to be taken care of." He then looked at me and says, "Kind of an embarrassing thing."

Q Somebody say something in response to that?

A Yes.

Q Who said it and what was said?

A Mr. Walgren said, "It doesn't embarrass me in the least. I'm not going to be here forever." I then suggested that we all get together and discuss this further at some future time.

(TR 146 -- 48.)

Walgren argues that this testimony of when he first agreed to exchange money for legislation could have been rebutted had the Government disclosed a December 22, 1978 telex, from the Seattle FBI office to the National Director, which stated:

> The Bureau should note that no funds are being requested by the Seattle Division to pay Bagnariol or Walgren, inasmuch as it is not known what the individuals will ask for in return for their influencing legislation. It is possible these individuals will be satisfied with taking part of the [undercover agent's] business enterprise in the state of Washington, which, according to the [U.S. Attorney], would be very prejudicial to them in a court of law without costing the government a great deal of money.

12/22/78 FBI Telex (Exhibit E). Walgren points out that the same telex anticipated that during the next four months, Bagnariol, Walgren, and possibly others in the state legislature would make incriminating statements to the undercover agents (UCA) concerning their interest and desires in

obtaining money or favor for influencing critical legislation. Walgren argues that the defendants could have argued from the telex that such incriminating statements had not been made by December 1978, one month after the meeting which Reed (Special Agent Heald) testified that Walgren agreed to exchange gambling profits for legislative favors.

What Walgren fails to point out, however, is another portion of the same telex which states:

> John Bagnariol and . . . Gordon Walgren have both made comments to the undercover agents intimating they would not be embarrassed in talking about money in exchange for certain favors. In other words, while details of the agreement had not yet been worked out, the parties had agreed in principle.

The December 22 telex is not proof of perjury, nor an endorsement of Walgren's innocence, but is instead a confirmation of the FBI belief that by that time Walgren had

agreed in principle to influence certain legislation in return for some yet undetermined reward or favor. The telex implies an agreement by Defendants to influence legislation; it also demonstrates that the specific quid pro quo had not been finally determined. Heald's testimony indicates there was a willingness to influence legislation and an assessment of ability to do so even if the majority were lost in the House. Heald's testimony also demonstrated that the parties contemplated receipt of money, but the specifics of this consideration was left to future discussions. The December 22, 1978 telex is consistent with Special Agent Heald's trial testimony concerning the November 8, 1978 meeting. (TR 147 -- 48.)

The 12/22/78 telex neither gives rise to an inference of perjury, nor can it be considered exculpatory or impeachment material.

b. **2/21/79 FBI Telex, 2/26/79 Letter, and Washington State Patrol Report.**

The February 21, 1979 telex refers to the Defendants' share of the undercover agent's business being "18 percent of the UCA's business in Washington state." The February 26, 1979 letter contains a list of parties recorded on February 13, 1979, but does not list Walgren. The Washington State Patrol Report refers to the Defendant's reward for assisting in passing gambling legislation as "18% of the gross business of SoCal Enterprises."

The February telex, letter and Washington State patrol (WSP) report could have been used, argues Walgren, to impeach Reed (Agent Heald) who testified as follows:

> Q What happened about that conversation?
>
> A I then told Walgren that what they tried to put through this session was being left up to them but that the house-backed games issue was important.

Q And then what happened?

A I then asked Walgren if he was satisfied with the 18 percent.

Q Did he respond to that question?

A Yes, he did.

Q What did he say?

A He told me that he was.

Q Then what happened?

A He then asked me how I intended to set up the business. I told him we planned on purchasing and operating each cardroom as a separate entity or a separate corporation. I then asked him since he was an attorney, and all, that he may have some suggestion as to how we might handle their percentage.

Q What did he say to that?

A He didn't respond directly to that question. He looked straight at me and said, "Look, I don't know you very well. I've only met you a couple of times. Let me tell you, I'm in favor of gambling, my constituents are, too, and so I'll be passing legislation for my constituents."

Q What did you say to that?

A I then asked him, I said, "If we own cardrooms in the state of Washington, then we'd be your constituents." And he said, "That's right."

(TR 228 -- 24.) Walgren also cites testimony of Reed (Heald) concerning the tape recorder: (voir dire examination by Mr. Savage)

Q Was the tape recorder that you were using on this occasion the same recorder that had malfunctioned on the previous occasion?

A Yes, it was.

Q And what was wrong with it this time?

A I assume the same thing that was wrong with it the last time. The recorder worked fine. There was something wrong with the switch.

Q But, as I understand it, the last time the switch went off and came on all by itself, is this correct?

A That's right.

Q But this time it just went off?

A No. It went off that morning or that afternoon prior to my first meeting Gallagher. It came on again when Gallagher and I returned to the Aladdin that afternoon.

Q This time it also went off and came on all by itself?

A That's correct.

Q I'm sorry. Well, then, when was it that you found out that it hadn't worked properly?

A That day.

Q After the meeting you had with Mr. Gallagher at the Aladdin?

A Yes.

(TR 227.) Walgren argues that the letter, telex, and report could have been used to impeach the above testimony of special Agent heald. Walgren's argument lacks merit for the following reasons.

(1) The February 26, 1979 letter from the FBI to United States Attorney Merkel and Assistant United States Attorney Michael Ruark does not list Walgren as

having been recorded on February 13, 1979, nor does it indicate that the recorder was malfunctioning. The letter states that it is in response to a telephone request of Assistant United States Attorney Ruark for "copies of all body recordings and telephone monitorings made by the undercover agent." (February 26, 1979 Letter, Exhibit Q.)

Walgren was not listed as one recorded on February 13, 1979 because he was not recorded. Thus, the letter corroborates Agent Heald's testimony. That the letter does not refer to the malfunctioning recording equipment is of no significance in this context, as the letter is simply responsive to an oral request. There is no expectation under the circumstances that information about a malfunctioning recorder would have been included with the list, given the regular contact between the FBI and the Untied States Attorney's office during the investigation.

The February 26, 1979 letter is not indicative of perjury, nor is it exculpatory.

(2) The February 21, 1979 FBI telex (Exhibit R) states in part:

> During a meeting with Bagnariol, Walgren, Gallagher, and the UCA on February 13, 1979, Bagnariol and Walgren agreed to change Washington state gambling legislation so as to attempt to get casino or house backed games in return for 18 percent of the UCA's business in Washington state. The UCA is purporting to be a representative of a California based company that is interested in getting in on the ground floor of casino gambling in Washington state. It is the belief of Bagnariol, Walgren, and Gallagher, that the UCA represents an organized crime group.
>
> * * *
>
> During the February 13 meeting, Bagnariol and Walgren indicated a desire to travel to California, if possible, to meet the UCA's superiors after this topic was broached by Gallagher. AUSA, Seattle, has advised it would assist this case if these individuals would travel to San Francisco and finalize or at least talk about the drawing up of a contract for 18 percent of the UCA's business. It is the opinion of the Seattle Division

> that putting Bagnariol and Walgren on foreign "turf" would aid in getting them to commit themselves.

(3) The Washington State Patrol report also refers to an 18% figure and states, in part:

> Agent Heald stated that in return for BAGNARIOL and WALGREN assisting the legislation getting passed they agreed to receiving 18% of the gross business of SOCAL ENTERPRISES, which is the undercover business being used as a front by agent Heald.
>
> BAGNARIOL, WALGREN and GALLAGHER stated they were very happy with the 18% figure.

(WSP Officer's Report of 2/16/79, Exhibit S.)

Agent Heald's testimony refers only to 18 percent. The FBI telex refers to "18 percent of the UCA's business in Washington state." The WSP officer's report refers to "18% of the gross business of SoCal Enterprises." Walgren argues that with this evidence he could have impeached Reed (Heald).

On the contrary, these asserted "inconsistencies" could not have impeached Heald as there is no inconsistency. The 18% figure is corroborated. Whether the percentage referred to "business," "gross business," or even "profits" is a mere quibble with language in the summaries. Neither the telex nor the FBI letter, nor the WSP report supports a claim of perjury. It is obvious that neither the February 21 telex nor the WSP report were intended as detailed legal analyses of the terms of the agreement.

c. **April, May, and June 1979 FBI Telexes (Exhibits V Through Y).**

There are other documents that Walgren argues contradict the agent's testimony regarding the previous two meetings of November 8, 1979 and February 13, 1979.

4/79 FBI Telex (Exhibit V). This telex from the Seattle FBI office to the National Director states in part:

> The monitored conversations concerned, in part, what Bagnariol and Walgren would do concerning legislation in return for as yet unspecified amounts of money or percentages of business interest on the part of the [agent].
>
> Additional conversations with the above named individuals are anticipated at which time attempts will be made to resolve and clarify matters.

This telex is not exculpatory nor does it imply perjury by Agent Heald. Heald's 18% figure at page 223 of the transcript does not indicate where the percentage was to come from. That testimony is consistent with the FBI telex concerning further monitoring of conversations to try to "resolve and clarify matters." There were details about the agreement yet to be worked out.

5/79 FBI Telex (Exhibit W). This telex states in part:

Further, conversations about Bagnariol and Walgren receiving a percentage of the UCA's business in the State of Washington, in return for the introduction or attempted introduction of gambling legislation, had received tacit approval, although no specifics have been discussed.

Both Bagnariol and Walgren have told the UCA they would like to travel to San Francisco, California, to meet the UCA's superiors and discuss with them the legislation they will propose and what they want in return. They wish to do this following adjournment of the legislature, which is expected to occur sometime in May, or June, 1979.

The telex further states:

It is the opinion of the AUSA handling this case that a conspiracy charge on Bagnariol, Walgren and Gallagher is near, but all the necessary elements have not yet been met. The AUSA feels that if Bagnariol and Walgren travel to California, to meet the UCA's superiors (another FBI UCA), they will possibly make the necessary admissions so as to complete this phase of the case.

* * *

It is further felt a trip to California, will allow Bagnariol and Walgren to "seal" the bargain concerning legislation and favors

> with the UCA's superiors. The U.S. Attorney, as well as the Seattle Division, feel this matter should not continue indefinitely and therefore, this proposed trip to California, should be the culmination of the year-long investigation.

This telex is consistent with Heald's testimony. Heald testified that at the end of the February 13, 1979 meeting, a future meeting was discussed.

> Q Did San Francisco come up?
>
> A Yes, it did.
>
> Q In what way?
>
> A Gallagher suggested that in two or three weeks, we should all take a break and go down to San Francisco so that they could meet my people, they could relax, play a little golf, and they could make the same assurances to my people.
>
> Q Did the meeting break up shortly after that?
>
> A Yes, it did.

(TR 225.)

The May telex does not imply perjury nor is it exculpatory.

5/17/79 Criminal Investigative Division "Addendum" (Exhibit X).

In this addendum to the foregoing May 1979 FBI telex, there is the following statement:

> In this teletype, Seattle reports marginal success and states that subjects, who are members of the Washington State Legislature, have, in fact, drafted changes to gambling legislation which would be beneficial to the undercover Agent (UCA) acting within the established scenario.

(5/17/79 Addendum, Exhibit X.) The word "marginal" is a relative term, and under the circumstances consistent with Heald's testimony. there was general agreement to the idea of supporting gambling legislation, and in return everyone would make money, everyone would be taken care of. (TR 147 -- 48.) Then, at the end of a later meeting, Defendant Gallagher made the suggestion, according to Heald, that

> ... we should all take a break and go down to San Francisco so that they could meet my people, they could relax, play a little golf,

> and they could make the same assurances to my people.

(TR 225.) The entire evidence -- testimony and telex -- demonstrates the willingness and receptivity of the defendants to the scheme in return for benefits all around.

The May 17, 1979 addendum does not give rise to an inference of perjury nor is it exculpatory.

6/1/79 FBI Telex (Exhibit Y).

In this June 1979 telex is a request for a 60-day extension of Department of Justice authorization to use a body transmitter and recorder to monitor the conversations of Defendants Gallagher, Bagnariol, and others yet unknown, and the undercover agent. The May 17, 1979 telex was for the purpose of requesting additional funds to continue the undercover operation. The telex states in part:

> Additional conversations with above named individuals are

> anticipated at which time attempts will be make to have the subjects clarify exactly what they will do for the UCA and what they expect in return.

(6/1/79 FBI telex, Exhibit Y.) Here is yet another way of indicating there were details to be worked out. This sequence of FBI telexes (Exhibits V - Y) together indicate there were interested, receptive individuals, who had agreed to a basic plan, but from whom more specific statements would likely be forthcoming.

The June 1, 1979 FBI telex neither implies perjury by any FBI agent nor is it exculpatory.

The April, May, and June FBI telexes reiterate the basic information concerning the understanding between the parties as testified to by Special Agent Heald. The defendants were amenable to influencing legislation in return for some profit for themselves. Exact figures and means to transfer the gain to Defendants had to be

worked out, hence the discussion of a future meeting.

d. **July and August 1979 FBI Telexes (Exhibits BB, F. & AA).**

In July 1979, the San Francisco meeting took place. Walgren testified he went to San Francisco on about July 21, 1979 for a meeting of the National Conference of State Legislators. Walgren testified to being introduced to Vic Spann (Undercover Agent Desvernine). (TR 3120 -- 23.)

Agent Heald testified about this meeting of July 27, 1979, which occurred in the lobby of the Hilton Hotel in San Francisco. (TR 489.) Heald wore a Nagra body recorder to the meeting. (Id.) Following voir dire of Agent Heald on the subject of the malfunctioning Nagra recorder (TR 490 -- 96), direct examination resumed, and Heald testified that just before the

tape recorder failed, Walgren was talking about the Commerce Committee:

Q (By Mr. Ruark) What was the conversation about as far as it related to the Commerce Committee?

A They were talking about -- Mr. Walgren suggested that they use, it was my understanding, form a subcommittee in this Commerce Committee. they talked about a Finance Committee and A Commerce Committee, forming a subcommittee to conduct a poll around the state to find out hopefully that the people are in favor of gambling, expanding gambling in the state, which would be used later. When they started to introduce legislation, they could point to a subcommittee of the legislature, their findings, for support.

Q Now, at any time during this conversation after the tape ran out did Mr. Walgren express any concerns?

A Yes, he did.

Q What were they?

A He said that probably he was going to run for Attorney General and that he could never be associated with our gambling interests because of

that. I told him that the Cayman Island corporation would solve those problems of association and payments because of the nondisclosure down there. Bagnariol agreed with that.

Q Now, did you have any further conversation with Mr. Walgren after the tape ran out about the 6 percent figure?

A Yes, I did.

Q And what was that?

A I asked him again, this time instead of saying the 6 percent is there, you know, if you hold up your end. I asked him the same as I had before, telling him that Vic was still concerned that he was satisfied. I asked him, "Are you satisfied with that 18 percent or getting your 6 percent?" And he looked at me and said, "I'm satisfied with everything. The only concern I have is how and when to do it."

(TR 497 -- 98.)

Agent Desvernine (Vic Spann) testified. he was asked whether he was familiar with the tape recording of the July 27, 1979 meeting:

A Yes, sir. I've listened to it on two occasions.

Q And are you familiar with how many times the subject of the 6 percent comes up in that tape recording?

A Yes, sir.

Q How many?

A On one occasion on tape.

Q Do you recall what was discussed the second time it came up?

A Generally, yes, sir.

Q Could you tell us what that was?

A Sir, I heard Special Agent Heald mention specifically again to Mr. Walgren about the 6 percent and I recall Mr. Walgren's reply was generally that he was in agreement with it. I don't recall his specific words.

Q Did you yourself speak directly to Mr. Walgren about this gambling venture?

A Yes, sir, I did.

Q What did you say to him?

(TR 522.)

After an objection based on repetition was *overruled, Desvernine (Spann) continued:*

A As we were breaking up the meeting, the breakfast get-together, I shook Gordon Walgren's hand and asked him at this point, I said, "Well, Gordy," I said, "Are you committed? Do we have a go?"

Q And what was his response?

A His response was, "I'm committed." And he said, "It's a go, but it better be foolproof."

Q Now, did you discuss with Mr. Walgren the possibility of getting together with him at a later time?

A Yes, sir.

Q Who brought that up?

A Mr. Walgren did.

Q What did he say?

A He stated that it was too bad we didn't get to spend more time together, he would like to play some golf, discuss some further business. He said that he would possibly be in San Francisco in August and he would make arrangements through Hal Heald to get together with

> me. And it was very general and it was left open.

(TR 522 -- 23.)

7/13/79 FBI Telex (Exhibit BB).

> The telex of July 13, 1979 requests additional funds to pay Gallagher for several more months, to pay for lodging and related expenses for Bagnariol, Walgren and Gallagher in California on July 24 and 25, and other expenses as yet unknown which are expected to be incurred as a result of this case gaining impetus.

(Id. at 4.)

It also summarizes activities of Defendants Bagnariol and Gallagher; specifically referenced are June 22, 1979 and July 10, 1979 meetings of Bagnariol and Gallagher with the undercover agent and/or his supervisor. United States Attorney John Merkel is reported to be pleased with the progress of the case:

> On July 11, USA John C. Merkel, Jr., Seattle, listened to applicable portions of the recording of the July 10 conversation at which time he indicated he felt numerous violations including Hobbs Act -

> extortion, ITAR, and state bribery had possibly been committed by Bagnariol and Gallagher. he stated he was very pleased with the progress of this case and speedy progress in a case of this magnitude could not be expected. he said he wished this matter pursued with an emphasis on continued contacts with all subjects so that additional incriminating statements could be obtained from them.

(7/13/79 FBI Telex at 2 - 3, Exhibit BB.)

The telex continues as follows:

> On July 10 and 11, Gallagher told the UCA he had spoken with Gordon Walgren several times and Walgren indicated he wished to talk with the UCA about plans for the future including, presumable, what part he will play in the above scheme and it is anticipated the UCA will meet with Walgren the early part of week beginning July 16, 1979.
>
> During several conversations with Bagnariol and Gallagher as detailed above, mention has been made by them that they wish to again meet the UCA's superior when they travel, at their own expense, to San Francisco on July 22, 1979. Further, it is anticipated Walgren will be in San Francisco and will be introduced to UCA's supervisor.

(Id. at 3 -4.)

Defendant Walgren argues that had this July 13, 1979 telex been made available to him, he would have been able to argue that the FBI special agents did not even know what part he (Walgren) was to play in the scheme.

The argument is without merit. Gallagher (not the FBI) indicated that Walgren wanted to talk to the UCA about future plans. Walgren also told Spann it might be possible to meet in San Francisco in August to discuss further business. (TR 522-23.) Again, basic plans were accepted, but details needed to be developed.

This July 13, 1979 telex does not imply perjury, nor is it exculpatory.

7/31/79 FBI Telex (Exhibit F).

The July 31, 1979 FBI telex references "Seattle tels to FBIHQ July 12, 13, and 19" and requests additional funds of $10,000 to be expended as follows:

> $4,000 to Pat Gallagher for acting as public relations consultant for undercover agent (UCA) for July, August, September and October, 1979; $1,500 for expenses incurred by UCA as a result of his travels from Portland, Oregon to Olympia, Washington numerous times during the next three months. It is anticipated these expenses will include gasoline, food, drink and entertainment; $4,500 for travel of John Bagnariol, Gordon Walgren and Pat Gallagher as well as UCA to Grand Cayman islands to set up a corporation to receive profits from UCA's company. USA, WDW, Seattle, indicates this travel would be of great benefit to this case. Proposed expenses include $3,000 for air fare and $1,500 for food, lodging and entertainment while there.

(7/31/79 FBI Telex at 1 -- 2, Exhibit F.)

The telex continues with some details in reference to the July 27, 1979 San Francisco meeting:

> Details: During week of July 23-27, 1979 Portland Division UCA and San Francisco Division UCA met numerous times with John Bagnariol and Pat Gallagher in Monterey and San Francisco, California. conversations resulting from these contacts revealed Bagnariol is now positively committed to changing legislation to allow house banked

games (blackjack) and slot machines in return for which he wishes to be included in a Grand Cayman Island corporation which will receive profits from the gambling brought about as a result of new legislation. Bagnariol indicated a corporation in the Cayman Islands would avoid disclosure problems for him. To that end, Bagnariol caused (x [deleted] x), an acquaintance of his to fly from San Diego to San Francisco on July 26, 1979 at which time he [deleted] Bagnariol, Gallagher and UCA met and discussed how to establish the Cayman Island corporation. On July 27, 1979 both UCAs as well as Bagnariol and Gallagher met with Gordon Walgren in San Francisco, at which time legislative changes and remuneration were discussed. Walgren did not commit himself wholeheartedly to the proposed plan but did indicate apparent interest. Further, Walgren stated he wished to talk again with UCAs on his next trip to San Francisco in mid-August.

(Id. at 2 -- 3.) The telex continues:

Because of the very nature of a political corruption case such as this, it is extremely difficult to indicate when or where investigation will end. USA feels, however, the subjects are in definite violation of the law and there is continuing discussion as previously mentioned, in prior

> communications, as to which violations will be charge.

(Id. at 3 -- 4.)

The July 31, 1979 telex expands upon the basis for the request for $10,000 in additional funds that was set forth in one sentence on page 4 of the July 13, 1979 telex.

The statement that "Walgren did not commit himself wholeheartedly to the proposed plan but did indicate apparent interest" apparently refers to a discussion about "legislative changes and remuneration." The statement is ambiguous as the nature of the referenced "proposed plan" is not explained. This statement does, however, comport with testimony of statements attributed to Walgren. For example, Walgren not embarrassed about making money on the deal (TR 148); Walgren satisfied with the 18 percent (TR 223); Walgren carefully stating he is in favor of

gambling and that he would be passing legislation for his constituents (TR 224); Walgren suggesting formation of a subcommittee to assist with findings in support of gambling legislation to be introduced (TR 497); Walgren having concerns about being associated with gambling legislation (TR 498); Walgren satisfied with everything but concerned about "how and when to do it" (TR 498); Walgren being satisfied with the "6 percent" (TR 522); Walgren "committed," but "it better be foolproof" (TR 522); and Walgren expressing interest in getting together again to play some golf and discuss some further business (TR 523).

The assessment in the telex may arguably be an apt description of Walgren's acts up to this point, insofar as it tends to support the need for further expenditures. It is a bland description of evidence that nevertheless reveals a savvy and wary Walgren interested in financial

reward, albeit through unsavory activities that he acknowledges could hurt his political career.

Considering the July 31, 1979 telex as a whole with the testimony of Special Agents Heald and Desvernine, the telex language could not have effectively undermined the credibility of the agents.

The telex is not inconsistent with Agent Heald's testimony, as Heald reports what Walgren said and did rather than characterize it. A defense effort to use this information in an exculpatory way would have been difficult, given the content of the telexes as a whole. Moreover, it would have been a vehicle to highlight the wily Walgren responses to the undercover agents compared with the more open acceptance of Defendants Gallagher and Bagnariol. For example, concerning Heald's meeting with Walgren on November 8, 1979, Heald explained his reason for not recording the meeting:

Q And why weren't you prepared to record that meeting.?

A There were several reasons that went into that decision. One is that we generally don't record a meeting the first time with someone. Gallagher in the past had told me that Walgren was a former prosecutor and was very cautious and very careful and I felt that he might be aware of those type of techniques and may want to search me or do something that would cause its discovery. Plus going to the airport in Portland, I would have had trouble getting through the airport security systems. And also leaving Seattle, I didn't know whether they'd walk me back to the airplane or if, in fact, Gallagher would have met me out at the gate and would have been discovered in the airport.

(TR 139.) The reported exchange between Walgren and Heald (Reed) in San Francisco tends to underscore Walgren's shrewdness. Walgren was asked by Heald whether as a lawyer, Walgren had any suggestions as to "how we might handle their Percentage." (TR 224.) Heald was asked:

Q What did he say to that?

A He didn't respond directly to that question. He looked straight at me and said, "Look, I don't know you very well. I've only met you a couple of times. Let me tell you, I'm in favor of gambling, my constituents are, too, and so I'll be passing legislation for my constituents."

Q What did you say to that?

A I then asked him, I said, "If we own cardrooms in the state of Washington, then we'd be your constituents." And he said, "That's right."

(TR 224.) This July 31, 1979 telex does not imply perjury, nor is it exculpatory.

8/1/79 FBI Telex (Exhibit AA).

The August 1, 1979 telex references a June telex and "airtel" and is for the purpose of obtaining Department of Justice authorization to use a body recorder and/or transmitter to monitor conversations between Defendants Gallagher, Bagnariol, and

Walgren, others yet unknown, and an FBI undercover agent.

Defendant makes the same argument concerning this August telex as with the July 13, 1979 telex. This telex consists of two double-spaced pages and such a brief summary as to suggest the request is a mere formality. The August telexes; assessment of Walgren's activity anticipates more detailed future results without laboriously going over what evidence already existed against Walgren.

This August 1, 1979 telex is consistent with the July 31, 1979 FBI telex. The assessment avers there was general agreement, but more details were being sought. This August 1, 1979 telex does not imply perjury nor is it exculpatory.

e. **October 1979 FBI Memo and Addendum (Exhibit CC).**

Defendant Walgren refers to this memo as evidence of "the Government's continuing attempt to get Walgren to break the law." (Defendant's Brief at 23.) The purpose of the memo was to seek additional funding:

> 1. $4,459.60 to finance a previously authorized trip to the Grand Cayman Islands, British West Indies, for the subjects of this investigation, two UCAs and backup support Agent;
>
> 2. $10,000 for payments at $5,000 for the next two months to subject John Bagnariol, and;
>
> 3. $5,000 for payments to Gordon Walgren to finance purchase of a Cayman Island corporation.

(10/79 Memo at 2, Exhibit CC.) The memo also states in part:

> Six thousand five hundred dollars is being requested to allow the previously approved trip to the Grand Cayman Islands to go forward. It should be noted that the requested amount exceeds the $4,459.60 that was requested in the attached teletype. This is due to the possibility that a San Diego connection may be able to

> travel with the three principals and two UCAs for the purpose of selling an already existing Grand Cayman corporation to subjects. Such sale would provide the overt act desired for a prosection [sic]. The corporation is being established by the subjects to launder funds (payoffs) anticipated from the UCO gambling profits and thereby its establishment will create an overt act (toward accepting extorted funds).

(Id.) The memo reflects Agent Heald's testimony concerning a Cayman island corporation:

> Q Now, at any time during this conversation after the tape ran out did Mr. Walgren express any concerns?
>
> A Yes, he did.
>
> Q What were they?
>
> A He said that probably he was going to run for Attorney General and that he could never be associated with our gambling interests because of that. I told him that the Cayman Island corporation would solve those problems of association and payments because of the nondisclosure down there. Bagnariol agreed with that.

(TR 498.)

It is consistent with Walgren's testimony:

> Q Okay, From that time during the next three or four weeks up until the 22nd of August, 1979, is this the first period where you did indeed get a phone call or two from this fellow Hal Reed?
>
> A Yes. Shortly after I returned from San Francisco, I started receiving phone calls from Mr. Reed and from Mr. Gallagher, and the basic tenor of the phone calls was to try to set up some sort of a trip to try to get me to come down to California or to -- they mentioned this Cayman Island situation, whether I would like to take a trip down to the Cayman Island, and being kind of an itinerant traveler, I expressed my interest in that and other things.

(TR 3124.)

The memo reflects the FBI's belief at that time of the willingness of the Defendants to take yet another step in support of their commitment to the scheme.

The October 1979 memo does not imply perjury, nor is it exculpatory.

f. **November 1979 Form Memos.**

11/13/79 Form Memo (Exhibit DD).

This memo is another request for funds. It states, in part:

> This money is to be used by Undercover SA Heald as follows: $5000 is to be paid, if necessary, to Gordon Walgren (Washington State Senate Majority Leader) when he travels to San Francisco on 11/14 and after he makes necessary commitments [sic] as previously discussed with the U.S. Attorney.

(11/13/79 Form Memo, Exhibit DD.) The money was returned, however, as Walgren was not going to be travelling to San Francisco on November 14 owing to other commitments. (FBI Memo of 11/16/79, Exhibit EE.)

11/23/79 From Memo (Exhibit FF).

This memo requests funds with virtually identical language to the November 13 request:

> These funds are to be used by SA Heald to pay for the following: $5000 is to be paid, if necessary, to Gordon Walgren (Wash. State Senate Majority Leader) when he travels to Las Vegas on 11/26 and after he makes necessary commitments as previously discussed with the U.S. Attorney.

(11/23/79 Memo, Exhibit FF.)

Additional requests for funds to pay Walgren or to carry on the investigation are cited in Exhibits GG through II.

These memoranda do not give rise to an inference of perjury, nor are they exculpatory. They are merely indicative of the agents' relief that there may be an opportunity to use the funds as expressed. Walgren argues that the agents' testimony could have been impeached with these memoranda, but that is speculation about an exceedingly unlikely result.

All the telexes and memoranda discussed above exemplify the need for the FBI to show a basis for funding their undercover operations. These telexes are not primary

evidence of the defendants' acts or failures to act. They represent efforts to get funding and recording authorization. The Cayman Island corporation matter was outstanding, and the FBI naturally wanted to be ready with funds for every contingency. The telexes comport with the testimony of the participating agents who actually met with the Defendants.

The assertion that the internal documents of a bureaucracy justifying its attempts to obtain more funds are exculpatory or imply perjury is based on a most precarious foundation. The jury's verdict cannot be set aside, nor a new jury influenced by these internal case evaluations that may be colored by the purpose for which they were written. The telexes in fact appear more harmful than helpful to Walgren when reviewed in their entirety.

Summary Re Telexes and Memos

As earlier explained, the telexes and memoranda discussed in this section relate to the testimony about three meetings: November 8, 1978, February 13, 1979, and July 27, 1979.

The November meeting established the basic agreement to influence legislation for money. The telexes reflect this general proposition without specifics of how the Defendants would perform their part of the bargain or what precisely they would receive in return.

The February meeting resulted in the percentage concept for Defendants' performance. The telexes reflect the 18% figure for three defendants.

The July meeting, where the Defendants met Vic Spann, solidified the general scheme, and reaffirmed the Defendants satisfaction with their benefits and

obligations under this agreement. Walgren still had concerns about this part of the bargain "how and when" to obtain the desired legislation, and was likewise concerned about his being associated with any payments from SoCal. The telexes generally reflect these circumstances.

It is evident that demonstrating an ability to perform was a complex matter for both the Defendants and the Government agents. Effecting the passage of controversial legislation is certainly difficult, requiring coordination and persuasion among many individuals of various idealogies. For example, regarding the legislation, Walgren had concerns of "how and when to do it"; these concerns could have related to such details as:

1. How to get the legislation passed;

2. What political support was needed for passage;

3. How and when was the best time to introduce the legislation;

4. How to avoid the Governor's veto;

5. How to generate voter support;

6. How to insulate himself from such legislation and any negative political fallout;

7. What would be the form of payment of his 6%;

8. How was it to be paid;

9. When would it be paid;

10. How could he avoid the mandatory reporting requirements of the state laws on ethics.

For the government, the complexities of documenting the corporation and acting out the various roles required significant financial resources as well as considerably talented special agents. They, too, may rightfully have been concerned with such details as the form and place of payment to the Defendants. Understandably, there were

incredible numbers of opportunities for things to go wrong.

Given the complexity, it is not surprising that the investigation continued as long as it did, or that funding requests and recording authorizations were repeated. Both sides had to give assurances. Each side was trying to take the measure of the other. The complex nature of the promises given on both sides was susceptible of the parties reaching general agreement on basic obligations with the details of performance to be determined as the parties took action and the scheme progressed. it is difficult to see how, by its very nature, the matter could have progressed any other way.

The telexes are remarkable consistent with the special agents' testimony. The alleged inconsistencies are insignificant minutiae of featherweight proportion even taken in their entirety.

The telexes and memoranda fail to establish the Defendant's claim of knowing use of perjured testimony. Neither do these documents comprise exculpatory evidence that the Government should have produced pursuant to Brady. Under the totality of the circumstances, there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. Even considering the impact of this evidence as a whole, its effect is not helpful toward Defendant Walgren.

Other Evidence

a. Fingerprint Report.

Walgren refers to other inconsistencies between government testimony and alleged newly discovered exculpatory evidence. For instance, Walgren points out that a government agent testified that Walgren

examined So-Cal trust documents page by page:

> A At that point, Gallagher asked me to show to Mr. Walgren the trust documents and loan guarantees that I had shown to Mr. Gallagher previously.
>
> . . .
>
> Q Did you show them to Mr. Walgren?
>
> A Yes, I did.
>
> Q What did he do?
>
> A He looked through them page by page and handed them back to me.

(TR 143.) Walgren alleges, however, that he Government failed to make known to the defense before or during the course of trial the results of a fingerprint report that he believes may concern these specific documents, to wit that

> 33 Latent FPs and 7 latent palm prints were developed on 8 of the documents. 32 were identified as Harold Healds [sic].

7/12/79 Fingerprint Report (Ex. I). Walgren states that the report concludes that no identification of the remaining prints could be made, but that the use of that report in cross-examination could have materially affected the impact of that testimony.

At the May 10, 1991 hearing on this motion, however, the Government stated that the referenced fingerprint report did not pertain to those So-Cal trust documents, and the defendant has not shown otherwise. The claim is therefore without merit.

Walgren asserts that the information attached to his March 1988 affidavit should have been produced as exculpatory information pursuant to discovery requests. The alleged exculpatory information involves, among other things, evidence of the involvement of the U.S. Attorney's Office and the Washington State Patrol in the Gamscam "sting"; evidence of the lengths that the Government went to make So-Cal

appear to be a legitimate business; and evidence of the mechanical difficulties with the Nagra recorder.

b. **Personal Interest of U.S. Attorney.**

Evidence that then U.S. Attorney Merkel took a personal interest in the case does not enhance Walgren's arguments. There was testimony and argument at trial concerning Mr. Merkel's participation in decisions through the undercover operation. For example, in Mr. Finegold's voir dire examination of Agent Heald regarding who reviewed certain tapes, Heald stated:

"Mr. Merkel, Mr. Ruark, and Mr. Jones." (TR 412.) In another exchange on voir dire of Agent Heald by Mr. Finegold, Heald responded to a question concerning who from the United States Attorney's Office Heald saw before going to Silverado. Heald responded:

"Mr. Ruark and Mr. Merkel, and I think Mr. Jones was there, I'm not sure."

(TR 443.) During cross-examination of Agent Heald by Mr. Finegold, Mr. Finegold asked:

Q The payment to Mr. Gallagher on March 1, did you discuss that with Agent Gordon?

A Yes, I did.

Q Did you discuss it with Mr. Merkel?

A I discussed it with all three of them.

Q Mr.Merkel, Mr. Ruark and Mr. Jones?

A Yes.

(TR 1354.) During direct examination, Agent Gordon was questioned about meetings with the United States Attorney's Office regarding the progress of the case, and was asked:

Q And were all three of the members of the prosecution team present at these meetings?

A Not all of the meetings, no.

Q Some of the meetings, all three of them were present?

a I believe so.

(TR 2356.)

This "newly discovered evidence" is consistent with what was known by all participants at the trial. Additionally, considering the nature of the case and the statewide political standing of two of the Defendants, it would be highly unusual if the United States Attorney did NOT take an active role in the case.

c. **Participation of Washington State Patrol.**

The Defendants were aware of the Washington State Patrol's participation in the case. For example, on cross-examination by Mr. Savage, Agent Gordon testified as follows:

Q ... How long did Mr. Peregrin or any member of the State Patrol remain in assistance in the terms of surveillance, undercover role, anything of this nature?

A Well, if we can take them you know, one at a time, as an undercover role, as I previously stated, September, October, 1978, would be a fair representation of when he ceased that role. The other question, which is how long did he assist the FBI in surveillance would be I'd say until March of 1980.

Q Of 1980?

A Yes, sir.

Q In addition to Mr. Peregrin, you were receiving the assistance of Detective Ed Hanson of the Washington State Patrol?

A On that particular day, February 13 or 14, yes, sir.

Q And on March 21st of '79, you received the assistance of Lieutenant Dick Thurston of the Organized Crime Intelligence Unit of the Washington State Patrol?

A There were numerous of them involved, sir. I don't happen to have that date, that 302, handy there.

Q Do you remember Lieutenant Thurston participating?

A Yes, sir, I do.

Q Would his participation have extended up to approximately the time of the indictments herein?

A As I recall, March, I believe, of 1980, he assisted, yes, sir.

(TR 1454 -- 55.) Mr. Walgren's assertion that he did not know of the State Patrol's continued involvement into 1980 until after the trial, is not well founded.

d. Government's Efforts Re SoCal.

The evidence of the lengths to which the Government went to make the So-Cal operation appear to be financially stable and legitimate is not exculpatory evidence.

Defendant's exhibit A (p.4) specifically refers to Defendant Gallagher having questioned So-Cal's ability to pay for various gambling establishments. In response, "a loan guarantee was displayed to all three subjects and sufficed to convince

them of So-Cal's alleged legitimate ability to finance various operations." Id. Defendant's Exhibit M is consistent in its discussion of the undercover operation and the Defendants' concerns with its capabilities.

The Government's effort to make the undercover operation seem real was natural and crucial to the success of the "sting" operation. Assessed in the broad context of the entire course of dealing demonstrated at trial, Defendant Walgren's quibbles with this evidence is meaningless.

e. Nagra Recorder.

Walgren asserts that only once in the FBI communications about the Nagra body recorder does the subject of malfunction arise: the Nagra recorder was sent to the Technical Services Division from the Portland FBI office in October 1979 with the

following note from the Portland FBI Office to the Director:

> "For information of the Bureau, above recorder has been utilized on a regular basis in connection with an important ongoing undercover matter. The last utilization of this recorder resulted in the tape somehow getting caught, and wound around the capstan prior to going on to the take-up reel. It is also noted that the recording qualities seem to be diminished compared to other recorders in use."

(October 17, 1979 Memo, Exhibit O.)

Walgren argues that this note suggests that there had not been any difficulty with tape recording before the last utilization in October 1979; it does not reference the earlier attempts to record Walgren on February 13, 1979 and July 27, 1979. Walgren argues that this information would have been valuable to him because his defense at trial was that government agents did not present tape-recorded evidence of crucial meetings because the recordings would not corroborate the agents' testimony.

This matter was brought up at trial. There was extensive voir examination by defense attorneys on the subject of recorder malfunctions. Mr. Savage examined Agent Heald about the recorder malfunction in voir dire examination at TR 227 -- 230. Mr. Finegold examined Agent Heald on this subject at TR 231 -- 235. Other voir dire on the tape recordings by Mr. Savage and Mr. Finegold is located at TR 239, 252, 267 -- 69, 272 -- 73, 296, 303, 410, 440 -- 44. There are many other instances of such voir dire in Volume III of the trial transcript.

Failure to reference earlier malfunctions does not mean the did not occur. This October 17, 1979 memorandum is inconclusive of an assertion that there were no earlier malfunctions. Walgren's assertion of what this memorandum establishes is pure conjecture. The direct and voir dir examinations would have overwhelmed the ambiguous implication

asserted by Walgren. The memorandum thus does not imply perjury nor is it exculpatory.

Additionally, Walgren argued that this memorandum should have been produced as a maintenance record requested by Defendants. This memorandum is not, however, a maintenance record. It is simply a cover letter.

There is no reasonable probability that had the record been disclosed, the result at trail would have been different.

f. **Special Agents' Testimony**.

Walgren asserts that his conviction rests on the uncorroborated testimony of the agents. This is untrue. The Government effectively eclipsed the defense efforts to undermine the Special Agents' testimony when a reporter was called as a rebuttal witness.

Mr. Walgren had granted an interview to James K. Dullente, a newspaper reporter, on

April 12, 1980. This was following the filing of a criminal complaint against Mr. Walgren on April 2, 1980, but before his discovery rights had enabled him to learn that the Government's tape recorder had malfunctioned on several key occasions. Mr. Dullente testified that Mr. Walgren had told him that he had discussed a proposition that 18 percent of the profits from gambling would be split between him, Gallagher, and Bagnariol (his codefendants) and that he "could very well have said I was interested in taking it." (TR 3757 -- 60.) Mr. Walgren's assertion of uncorroborated testimony is meritless.

g. Rough Drafts of 302 Forms.

The issue of the destruction of rough drafts of FBI 302 forms authored by Special Agent Heald (which the Defense refers to as "notes") was litigated at trial. (TR 151-

52; 228-30) A form 302 in this case was created as follows.

After a meeting that was not recorded, the agent would write his report then give it to a typist. That typed report is a Form 302. (See, e.g., TR 228.) At trial, Defendants moved to strike Agent Heald's testimony asserting that the destruction of the longhand drafts of the typewritten reports violated the Jencks Act, 18 U.S.C. § 3500 and United States v. Harris, 543 F.2d 1247 (9th Cir. 1976). Harris prohibits the destruction of original interview notes taken by Government agents that contain statements "potentially producible" under the statute. Following testimony, briefing, and argument on the issue, this Court denied the Defendants' motion to suppress the agent's testimony in its order of August 20, 1980, which was affirmed in United States v. Walgren, 665 F.2d 1980, which was affirmed

in United States v. Walgren, 665 F.2d 877, 889-90 (9th Cir. 1981).

h. **Handwritten Notes.**

Handwritten notes that Walgren contends are notes of Special Agent Heald are, except for one, notes of Special Agent Gordon. Agent Heald testified at trial that he took no notes at crucial meetings for obvious reasons. (TR 139, cited supra.) No issue has been raised concerning the notes of Special Agent Gordon. The Defense declined an offered opportunity to cross-examine Gordon at the hearing regarding the authorship of the notes.

Summary of Other Evidence

Walgren's assertions concerning items a through h discussed above are frivolous. Every item has been rebutted.

Based on the forgoing discussion, the Court cannot conclude that the Government failed to disclose evidence favorable to Walgren in response to his discovery requests. The proffered evidence is not material in that there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different.

CONCLUSION

Throughout Defendant's argument concerning the alleged favorable evidence, this evidence is described as impeachment material. Defendant argues that this impeachment material could have successfully impeached the Government agents' testimony regarding Walgren's involvement in a gambling scheme. Walgren argues:

> Given the Government's reliance on its agents' uncorroborated testimony, the jury's difficulty in reaching a verdict against Walgren, and the fact that only

> the Travel Act charge remains, the Government cannot prove that there is no reasonable probability that the result of trial would have been different had the evidence in its files been disclosed.

Specifically, Walgren makes much of the crucial nature of Special Agent Heald's testimony and the need for the alleged exculpatory evidence to undermine his credibility. Defendant Walgren's argument on the effect of the alleged impeachment evidence discussed above, however, rings hollow.

The jury was instructed on weighing witness credibility:

> You are the sole judges of the credibility of the witnesses. You alone are to determine whether and to what extent any witness should be believed. If there is any conflict in the testimony, it is your function to resolve the conflict and to determine where the truth lies.
>
> In weighing the testimony of any witness, you may consider his or her demeanor on the witness stand; whether he or she appeared to have an accurate

> recollection; whether he or she has any motive for not telling the truth; to what extent he or she had the opportunity to observe the matters about which he or she testified; whether he or she had any interest in the outcome of this case; as well as any other matters that you feel bears upon the believability of his or her testimony.

It is proper to presume that he jury properly weighed the witnesses' credibility as instructed. There are obviously many factors that coalesce in a juror's mind to form an ultimate judgment of credibility, and it is of the court's belief that the minutiae asserted by Defendant Walgren could not have undermined the substantial basis of Special Agent Heald's credibility.

The alleged exculpatory evidence is not sufficient to buttress the defense arguments made at trial or to render new arguments that could have changed the result. Again considering this evidence in light of the totality of the evidence in the case, the alleged exculpatory information is

immaterial in that there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

The Court finds there was no perjury at trial. There is no reasonable likelihood that the proffered evidence of perjury would have affected the jury's judgment even if it had been presented.

Defendant Walgren has failed to demonstrate governmental misconduct under the standards described by the Ninth Circuit. Neither has Walgren satisfied the four-part test from Kenny as demonstrated by the above analysis. Walgren cannot satisfy two important parts of the four-part test that the evidence (1) is not material, and (2) in view of the evidence as a whole, the evidence would not have produced an acquittal.

NOW, THEREFORE, Defendant Walgren's motion for a new trial is DENIED.

Dated this 2nd day of July, 1991.

WALTER T. McGOVERN
United States District Judge

APPENDIX C

FILED
SEPTEMBER 29, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	NO. 91-30249
Plaintiff-Appellee,	)	
	)	D.C.
v.	)	No. CR-80-126M
	)	
GORDON L. WALGREN,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: WRIGHT, CANBY and WIGGINS, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

Telephone Conversation Between
SA Harold W. Heald and Gordon Walgren
Portland, Oregon, to Olympia, Washington
January 30, 1980

FEMALE: Good afternoon, Senator Walgren's office.

HEALD: Yeah, dear, this is Hal Reed calling. Is, ah, Gordy in?

FEMALE: Hi. He...ohhh, is on the other line. Can I have him return your call?

HEALD: Uh...

FEMALE: He's been on for some time, so you might quite a wait.

HEALD: Oh, is that right?

FEMALE: Yeah.

HEALD: Uh, gosh...

FEMALE: I think there's a good chance he would return it right away.

HEALD: Yeah, he just...he called me just a short time ago.

FEMALE: Oh, he did?

HEALD: Yeah.

FEMALE: Well, you better hang on then. I'll, ah, take a note in.

HEALD: Okay.

(Pause. SA Heald stops and restarts recorder)

HEALD: Yeah, this is Hal.

WALGREN: How are ya?

HEALD: Oh, not too bad.

WALGREN: Is it warmer down there yet?

HEALD: Oh, God, no. I see some clouds, ah, startin' to come in, though.

WALGREN: I dug out these two bills I was tellin' you about. Ah, the... Bjork was in here to talk to me a little bit about 'em. He wants to get 'em moving, but I'll send 'em down and you can take a look at 'em.

HEALD: Hey, that'd be great.

WALGREN: Uh, secondly, I talked to my partner about most of what we had discussed.

HEALD: Uh huh.

WALGREN: And, uh, how we could handle that particular thing.

HEALD: Uh huh.

WALGREN: And, ah, that's satisfactory.

HEALD: Oh, gosh, that's great, yeah. Just...okay. Hell, we'll have to, ah, we oughta get together and kinda go over some of that maybe then.

WALGREN: Hell, yah, we oughta do that just as soon as we can. We've...we've got, ah, there are a couple of people who have expressed an interest. I don't know how serious, but they're both up there in our area.

HEALD: Uh huh.

WALGREN: And, ah, I...one of 'em I'm not very enthusiastic about. The other one is a possi...well, more than a possibility, I guess--a probability--but I don't know him at all, but my partner has talked to him and..and he has simply told him that, ah, to you know, hold off until we see what goes on this week.

HEALD: Yeah, cau... Of cour...you know, if he makes you a...a hell of a deal, there's no sense passing that up either, you know.

WALGREN: No, I... Frankly, the deal wouldn't be as good as anything I think we could do with you.

HEALD: Okay. Ah... (Coughs) Excuse me. How, ah... Damn, what is today? Wednesday?

WALGREN: Yeah.

HEALD: I've gotta go down to Eugene tomorrow. Why don't I try and finagle my schedule around and, you know, maybe I can get up there in...

WALGREN: Okay.

HEALD: ...the next couple of days or whatever.

WALGREN: All right.

HEALD: Ah...

WALGREN: Weekend might be good time to...if we could possibly meet, ah...

HEALD: Yeah, okay. Yeah, hell, that's maybe a go...a thought, too. Where will you be this weekend?

WALGREN: Well, I'm gonna be up in Bremerton.

HEALD: Oh, over home, huh?

WALGREN: Yeah.

HEALD: Okay. Ah...

WALGREN: Now, we could, you know, we could vary that, but it might be wise to come up there and look around and see what's happening.

HEALD: Oh, sure. Yeah. Okay, why don't I...why don't I do that and, ah, you'll mail that other stuff down to me, huh?

WALGREN: Yeah.

HEALD: did he seem to think there was much hope or...or did you ask him about that other, you know, any, ah...

WALGREN: Ah, no. I didn't get into it at that detail at the moment.

HEALD: Oh, okay.

WALGREN: He was only tryin' to make sure I get...get some of these bills goin' for him, so I think that that's good.

HEALD: Oh, yeah, yeah. Okay, well, let me... (Coughs) Excuse me. Let me do some checking. Maybe I can make a couple calls and...and...and cancel somethin' or at least...

WALGREN: Yeah.

HEALD: ...we'll figure on this weekend or somethin' and I'll call you back.

WALGREN: All right.

HEALD: Okay, my friend.

WALGREN: Thanks.

HEALD: Sure. Bye.